No. 90-515

In the Supreme Court of the United States

OCTOBER TERM, 1990

LOCKHEED SHIPBUILDING COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

An employee covered by the Longshore and Harbor Workers' Compensation Act was injured in a work-related accident and was properly receiving total disability benefits. The question presented is whether the court of appeals was correct in holding that the employee was entitled to receive continued total disability benefits until the date when suitable alternative employment was available, and that the employer has the burden of showing such availability.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 909 F.2d 1256. The decision and order of the Benefits Review Board (Pet. App. 11a-18a) is reported at 22 Ben. Rev. Bd. Serv. (MB) 155. The decision and order of the administrative law judge (Pet. App. 25a-32a) and his orders on reconsideration (Pet. App. 18a-24a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1990. The petition for a writ of certiorari was filed on September 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 908, identifies four different categories of disability—permanent total, temporary total, permanent partial, and temporary partial—and separately prescribes the method of compensation for each. This case involves an employee who, the parties agree, was properly awarded temporary total disability benefits for a time after he was injured. When the duration of the employee's disability was determined to have changed from temporary to permanent, the employer contends that he immediately should have received permanent partial disability benefits. The court of appeals instead concluded that the employee was entitled to permanent total disability benefits for almost three years, and then was entitled to permanent partial disability benefits.

Sections 8(a) and 8(b) deal with permanent and temporary total disabilities, respectively, and provide in substance that an employee will receive two-thirds of his preinjury weekly wage while he is totally disabled. See *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 273-274 & n.8 (1980) (*Pepco*); Pet. App. 5a n.1. An employee who is permanently partially disabled is entitled to receive two-thirds of his average weekly wages for a specific number of weeks, regardless of whether his earning capacity has actually been impaired, if (as in this case) his in-

jury is of a kind specifically identified in the schedule set forth in Section 8(c)(1)-(20). 449 U.S. at 269; Pet. App. 5a n.1.

2. Petitioner Lockheed Shipbuilding Company employed respondent Wilborn K. Stevens as a shipscaler until he injured his right arm in May 1981, in a work-related accident. Pet. App. 4a, 12a. Since Stevens was unable to perform his regular job duties, his employer began to make temporary total disability payments to him pursuant to Section 8(b) of the LHWCA. Pet. App. 5a. On November 29, 1982, after extensive medical treatment including two surgeries, Stevens' physician determined that nothing more could be done for his medical condition; in worker's compensation parlance, he had reached "maximum medical improvement." *Id.* at 5a, 12a. On February 6, 1983, the physician determined that Stevens had a 20% functional impairment of his arm that significantly restricted physical activities. *Id.* at 12a. The medical determinations that Stevens had attained maximum medical improvement, but was still disabled, rendered him permanently rather than temporarily disabled.

While agreeing that Stevens' disability became permanent after he attained maximum medical improvement, the parties dispute whether he was totally or partially disabled at that time. In light of the physician's determination of a 20% disability, Lockheed stopped making temporary total disability payments in February 1983 and began paying Stevens scheduled benefits for a permanent partial disability. Stevens asserted, however, that he was not able to return to work and was therefore entitled to total disability benefits under the Act. Pet. App. 26a.

3. In December 1985, an administrative law judge conducted a hearing regarding whether and when

Stevens' total disability had become a partial disability. Stevens indisputably met his initial burden of proof by showing that he was unable to perform his former job duties due to his work-related injury. Pet. App. 26a-27a. Applying established law, the ALJ noted that a finding of total disability was "compelled" by the claimant's proof in the absence of a "showing of suitable available alternative work." *Id.* at 27a. However, relying on the report and testimony of Lockheed's vocational expert, the ALJ found that the employer had carried its burden of showing that Stevens was capable of working as a cashier at a convenience food store or as a cashier at a self-service gas station. *Id.* at 5a, 27a.

As for Lockheed's further burden of showing when these jobs were available to Stevens, the ALJ found that Lockheed demonstrated that these jobs were available as of September 30, 1985, "*but not before.*" Pet. App. 27a, 30-31a. The ALJ ruled that Stevens was entitled to total disability benefits until September 30, 1985, and to partial disability benefits thereafter. *Id.* at 5a, 19a-20a.

On Lockheed's motion for reconsideration, the ALJ rejected the employer's argument that the claimant should be considered permanently partially disabled as of the date his injury reached maximum medical improvement, rather than as of the date there was suitable alternative employment. The ALJ reasoned that maximum medical improvement relates to whether a disabled employee's condition is temporary or permanent, but "has nothing to do with" whether the disability is partial or total. Pet. App. 22a.

4. The Benefits Review Board did not disturb the ALJ's factual finding that the employer had failed to establish the existence of any suitable alternative employment before September 30, 1985. It nonethe-

less ruled that, under its previous decision in *Berkstresser* v. *Washington Metropolitan Area Transit Authority*, 16 Ben. Rev. Bd. Serv. (MB) 231 (1984), "permanent partial disability commences on the date of maximum medical improvement even if it is based on a later showing of suitable alternative employment." Pet. App. 15a. Accordingly, the Board held that Stevens was not entitled to total disability benefits from November 1982, when he attained maximum medical improvement, to September 1985, when, as Lockheed demonstrated, suitable alternative work was available. *Id.* at 5a, 17a.

5. Before the court of appeals, Stevens and the Director of the Office of Workers' Compensation Programs argued that the ALJ had reached the correct result and the Board had erred. The court of appeals agreed and reversed the Board's judgment. Pet. App. 1a-10a. The court held that an employee's "disability becomes partial when suitable alternative employment is or was realistically available to the employee, which must be demonstrated by the employer." *Id.* at 4a. The court rejected the Board's view that a showing of suitable alternative employment is "retroactive" to the date the claimant attained maximum medical improvement: "[U]ntil there is a job that the injured worker can perform, his injury is totally disabling." *Ibid.*

In reaching this result, the Court noted that LHWCA cases make clear that an injured employee has the initial burden of demonstrating that a work-related injury prevents him from performing his job. Pet. App. 6a. At that point, it is also well-established that the burden shifts to the employer to demonstrate that there is suitable alternative work available to the employee; if that burden is not met, the

employee is considered totally disabled. *Id.* at 6a. This burden, the court explained, requires proof that the employee is capable of performing specified work that is actually available. *Id.* at 6a-7a. The court thus concluded that Lockheed carried its burden of proving that Stevens' disability became partial only as of the date it showed the existence of suitable alternative employment.

The court further noted that the statutory terms "total" and "partial" relate to "the *degree* of the disability," while the terms "temporary" and "permanent" relate to the "*nature* (or duration) of disability." Pet. App. 7a. "This differentiation," the court said, "leads us to find maximum medical improvement to be an indication of permanent versus temporary disability and availability of suitable alternative employment to be an indication of partial versus total disability." *Id.* at 7a-8a.

The court further concluded that "[t]he statutory definition of 'disability' supports using the date of available suitable alternative employment as the indicator for when total disability becomes partial." Pet. App. 8a. "[D]isability" is defined in terms of "incapacity * * * to earn" (33 U.S.C. 902(10)), and thus, in the court's words, "encompasses an economic, wage-earning aspect." Pet. App. 8a. The incapacity "*to earn* is a result not of the permanent or temporary character of the disability, but the total or partial character of the disability." *Ibid.* The court noted that the Board's view "that a disability changes from total to partial at the same time it changes from temporary to permanent, advances the medical aspect of the disability while ignoring its economic aspect—the degree of the disability." *Id.* at 9a. The court found no statutory basis for confusing the medical and economic components or for assuming,

as the Board did, that alternative suitable employment was available to Stevens on the date of maximum medical improvement. *Ibid.*

Finally, the court noted that nothing in its ruling precludes employers from establishing "that there was suitable alternative available work at the time of maximum medical improvement, even several years after that point." Pet. App. 9a-10a. Citing cases in which employers had established job availability as of an earlier date, the court concluded that an employer's job survey can be used to establish employment opportunities at a prior date. *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. Lockheed does not assert, nor could it, that the court of appeals' precise holding conflicts with any judicial decision. As the court of appeals explained (Pet. App. 7a), the question it resolved regarding the exact point at which a temporary total disability becomes a permanent partial disability was "left unanswered by the existing case law." Although the specific issue was a matter of first impression in the courts of appeals, the holding below follows directly from accepted Longshore Act principles.

The court below relied upon well established burdens of proof applicable to Longshore Act disability claims. Once an employee establishes that he is unable to perform his regular job duties because of an employment-related injury, that employee is presumed to be totally disabled unless the employer demonstrates the availability of suitable alternative em-

ployment. Pet. App. 16a; *Hairston* v. *Todd Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988); *Lentz* v. *Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988); *Crum* v. *General Adjustment Bureau*, 738 F.2d 474, 479 (D.C. Cir. 1984); *New Orleans (Gulfwide) Stevedores* v. *Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).[1] In order to discharge this burden, the employer must show that the employee is medically capable and otherwise qualified to perform reasonably available jobs. *Hairston*, 849 F.2d at 1196; *McBride* v. *Eastman Kodak Co.*, 844 F.2d 797, 798-799 (D.C. Cir. 1988); *New Orleans (Gulfwide) Stevedores* v. *Turner*, 661 F.2d at 1042; *American Mut. Ins. Co.* v. *Jones*, 426 F.2d 1263, 1266 (D.C. Cir. 1970).

The court of appeals' ruling is, at bottom, a particularized application of the accepted principle that an employer has the burden of affirmatively proving availability of alternative employment. The court simply refused to "assume[]," as the Board did, that jobs shown to be available to Stevens in September 1985 were also available in November 1982, the date he attained maximum medical improvement. Pet. App. 9a.[2]

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[1] The First Circuit deviated somewhat from this paradigm for reasons not applicable to typical LHWCA cases like this one. See *Air America, Inc.* v. *Director, OWCP*, 597 F.2d 773, 779-780 (1979) (burden to establish suitable alternative employment did not shift to employer where former pilot, who was college trained and had a broad range of administrative and supervisory skills, no longer had the requisite degree of coordination necessary to be a pilot, but the deficiency did not "indicate an inability to perform other work").

[2] While asserting no direct conflict, petitioner argues (Pet. 9) that the decision below disregards "policies enacted by this Court" in *Pepco*. However, nothing in the decision below

2. Petitioner's assertion (Pet. 7-9) that the decision below conflicts with the language of the statute is incorrect. The court of appeals rejected the Board's use of maximum medical improvement as the touchstone of partial disability precisely because that result collided with the statute's differentiation between the nature and the degree of the disability. An injured employee's unresponsiveness to additional medical treatment is relevant to classifying a disability as permanent rather than temporary but does not aid in determining whether a disability is total rather than partial. The court's decision is supported by the statutory definition of "disability," which includes an economic component relating to wage-earning capacity that was ignored by the Board's decision to focus exclusively on maximum medical improvement. Pet. App. 8a-9a.

Petitioner's claim (Pet. 7-9) that the decision below conflicts with the "plain language" of Section 8(c)(1) is unavailing. Section 8(c)(1) provides that permanent partial disability benefits "shall be

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undermines Congress's purpose to provide "prompt and certain recovery for * * * industrial injuries." 449 U.S. at 282. The Court held in *Pepco* that employees who are permanently partially disabled by an injury specified in the schedule at Section 8(c)(1)-(20) must be awarded compensation under the relevant provision pertaining to their injury; they may not elect to claim an award for permanent partial disability under Section 8(c)(21) based on a loss of wage earning capacity applicable to other injuries. 449 U.S. at 270; see also *supra*, note 1. Under the decision of the court of appeals, Stevens is entitled to permanent total disability benefits to the date that, as shown by Lockheed, suitable work was available to him, and to permanent partial disability benefits (paid according to the schedule in Section 8(c)) after that date.

in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e)." Lockheed reads the subsection (Pet. 7) as saying that "*only* temporary disability compensation 'shall be in addition' to permanent scheduled disability benefits." But the statute does not include the word "only," the word Lockheed italicizes in making its plain language argument. Thus, the statute simply does not say what Lockheed contends it plainly says. On the other hand, Section 8(a) specifies that "[i]n case of total disability adjudged to be permanent[,] 66⅔ per centum of the average weekly wage shall be paid to the employee *during the continuance of such total disability*" (emphasis added). In this case, the court applied that language straightforwardly in concluding that Stevens was entitled to total disability benefits until, as shown by the employer, suitable alternative work was available.

Petitioner's position seems to be based on the notion that permanent total disability and permanent partial disability are immutable statuses, and that an employee's condition cannot change from one to the other. Such a theory is in tension with Section 22 of the Act, 33 U.S.C. 922, which permits modification of compensation awards based on changes of conditions. See, *e.g.*, *Director, OWCP* v. *Edward Minte Co.*, 803 F.2d 731, 734-735, 736 (D.C. Cir. 1986) (compensation award properly reopened because of a change in condition from permanent partial disability to permanent total disability). Moreover, it conflicts with the fact that whether a disability is total or partial depends in part on whether suitable alternative employment is available, an economic factor that may change even if a claimant's medical condition does not.

3. Because the holding below follows from well-established Longshore Act principles, petitioner is incorrect in characterizing (Pet. 5, 13) the court of appeals' decision as "creat[ing] a new form of recovery under the * * * Act" or as "significantly alter[ing] th[e] process" by which claims are resolved. See also *id.* at 6. Although petitioner attempts to characterize the Board's holding in this case as reflecting a well-established administrative position, the Board first articulated its position in 1984 in *Berkstresser* v. *Washington Metropolitan Area Transit Authority*, which is currently on appeal to the District of Columbia Circuit. *Director, OWCP* v. *Washington Metropolitan Area Transit Authority and Berkstresser*, No. 89-1473. Indeed, the ALJ in this case deemed the Board's *Berkstresser* decision to be of dubious precedential value because it effected "a dramatic departure from prior case law" without "a detailed rationale" from the Board. Pet. App. 23a. Moreover, the Director of the Office of Workers' Compensation Programs—who is entited to deference on the question—has consistently taken the position endorsed by the court of appeals.[3]

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[3] As the court of appeals noted (Pet. App. 4a), the interpretations of the Benefits Review Board (an adjudicatory, non-policymaker body) are not entitled to deference. *Pepco*, 449 U.S. at 278 n.18. And the clear weight of appellate authority correctly recognizes that the Director rather than the Board is entitled to deference under the LHWCA and the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, because the Director is the administrator and policymaker under these statutes. *Lukman* v. *Director, OWCP*, 896 F.2d 1248, 1250-1251 (10th Cir. 1990); *Newport News Shipbuilding & Drydock Co.* v. *Howard*, 904 F.2d 206, 208 (4th Cir. 1990); *Director, OWCP* v. *Palmer Coking Coal Co.*, 867 F.2d 552, 555 & n.3 (9th Cir. 1989); *Saginaw Mining Co.* v. *Mazzulli*, 818 F.2d 1278, 1283 (6th Cir. 1987); *Peabody Coal*

4. Finally, petitioner's speculative arguments regarding the impact of the decision (Pet. 5-7) are exaggerated. For example, petitioner claims (Pet. 6) that the decision below complicates LHWCA cases by making "evidence of the loss of wage earning capacity, for the first time, relevant whenever a claimant sustains a scheduled injury." But the requirement that an employer demonstrate an employee's retention of wage earning capacity only comes into play when an employee asserts that he is totally disabled, and petitioner recognizes that "[v]ery few scheduled injuries are of such severity that they even prompt the allegation of permanent total disability." Pet. 6.

As a practical matter, the court of appeals' holding simply requires that the employer's evidence relating to job availability focus on the time frame during which it believes a claimant's disability status changed from total to partial. Petitioner complains (Pet. 14) that this will unfairly require employers to conduct retrospective employment studies but does

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Co. v. *Blankenship*, 773 F.2d 173, 175 (7th Cir. 1985); *Bethlehem Mines Corp.* v. *Director, OWCP*, 766 F.2d 128, 130 (3d Cir. 1985); *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034, 1046 & n.23 (5th Cir. 1982) (en banc), cert. denied, 459 U.S. 1170 (1983). But see *Director, OWCP* v. *General Dynamics Corp.*, 900 F.2d 506, 510 (2d Cir. 1990) (neither the Board nor the Director should receive deference, at least where the Director's position "has not been articulated in a more objective context through the promulgation of regulations"), and *Director, OWCP* v. *Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 287-288 (6th Cir. 1988) (neither the Board nor the Director should receive deference). Thus, even if this case were viewed as presenting conflicting interpretations of the statute, both of which were reasonable, the interpretation of the Director should prevail. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984).

not justify its conclusion that this result is "unfair." The lower court cited a number of cases (Pet. App. 10a) in which employers successfully demonstrated suitable alternative employment with retrospective labor market surveys.[4]

Petitioner's assertion that employers *cannot* conduct studies of job availability until long after an employee attains maximum medical improvement (Pet. 14) is unsupported. Employers are generally aware of the course of their injured workers' medical treatment and will often be able to gauge when an employee has reached maximum medical improvement. See generally 33 U.S.C. 907. In this case, for example, petitioner ceased paying temporary total disability benefits and started paying permanent partial disability benefits only two months after the claimant's date of maximum medical improvement. Petitioner fails to explain why it did not conduct an employment study at that time, rather than waiting almost three years to do so.

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[4] The courts have placed the burden of proving suitable alternative employment on the employer because it is unfair to require employees to canvas the job market to prove a negative, *i.e.*, that there are no jobs they may perform given their disabilities. *Bumble Bee Seafoods* v. *Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980). We do not understand petitioner to question this principle in its general application, but only as applied in this specific situation to require the employer to focus its job survey on the time at which it claims a total disability became a partial disability.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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